



Costs Decision

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 28th February 2022

**Costs application in relation to Appeal Ref: APP/J0405/X/21/3283022
The Old Brickworks, Brick Kiln Lane, Bierton, Aylesbury HP22 5DA**

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 (the Act) and the Local Government Act 1972, section 250(5).
 - The application is made by Ecology & Arts Club Limited for a full award of costs against Buckinghamshire Council.
 - The appeal was against the refusal of a certificate of lawful use or development (LDC) to confirm that the siting of a caravan for human habitation throughout the year at The Old Brickworks/Bierton Lakes would not constitute a material change of use when compared to the existing Lawful Development Certificate ref. 04/02070/ACL.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

2. In essence, the applicant claims that the Council behaved unreasonably because reportedly:
 - a) The officer report on the LDC application referred to contaminated land based on a site investigation report commissioned in 2002, which had not been communicated to the applicant;
 - b) The officer report contained incorrect information about an alleged enforcement matter and to the effect that the LDC application was made under s191 of the Act (existing use) as opposed to s192 (proposed use);
 - c) The Council was potentially prejudiced against the LDC application because, notwithstanding that a Council panel had decided to delist the site as an asset of community value (ACV) in October 2020, the associated notice remained online.
 - d) A draft Neighbourhood Plan influenced the decision to refuse the LDC;
 - e) The Council sought to argue that a LDC issued in 2005 was defective;
 - f) The Council introduced a new, flawed, reason for refusal during the appeal in apparently arguing (once it had accepted that a replacement caravan, rather than a building, was present on the land following the 2005 LDC) that a material change of use of the site had occurred because the caravan was a static type rather than a touring one, and that this new use had not acquired lawfulness through passage of time;
 - g) The Council's reasons for opposing the application (both as specified in its Decision notice and the new argument it raised during the appeal) to the effect that a new act of development (material change of use) had occurred since the 2005 LDC, were unsubstantiated.

3. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
4. It is discernible from the officer report and Decision notice that matters a) to d) have no apparent bearing on the Council's stated reasons for refusing the LDC application. Therefore, any unreasonable behaviour associated with the allegations (were that to be established) would not in any event have caused the applicant to incur unnecessary or wasted expense, since the matters have not led in themselves to an unnecessary appeal or necessitated attention during the appeal process.
5. While at times I have found some of the appeal submissions less than fully clear and precise, I do not think that the allegation in e) is correct from what the Council has set out throughout the appeal process. Rather than challenging the validity of the 2005 LDC¹, its position in opposing the issue of the appeal LDC is that the s192 proposal would not be lawful as there has (in its view) been a material change of use of the site since the issue of the 2005 certificate.
6. Therefore, the most salient consideration for me in the context of this costs application is whether or not it was reasonable for the Council to oppose the LDC application for the reason it gave in its Decision notice (later withdrawn) and then with a different, though related, argument during the appeal (allegations f) and g)).
7. In the Decision notice (15 September 2021), the Council ended its reason for refusal in saying that "the applicant has not discharged the burden of proof". That sentence followed an explanation of why the Council considered a material change of use had occurred following the issue of the 2005 LDC, through the existence on-site of a structure that did not meet the statutory definition of a caravan. Following the refusal, the applicant commissioned a report from a Chartered Surveyor dated 19 October 2021² which, together with accompanying statutory declarations, satisfied the Council that the structure did indeed meet the statutory definition.
8. So, had the applicant initially failed to satisfactorily discharge a "burden of proof" in relation to the nature of the structure which had reasonably led to refusal in September?
9. Planning Practice Guidance (PPG) as regards LDCs says:

*"The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence."*³

¹ Council's response to costs application: "We never argued the 2005 certificate wording was unclear, ambiguous and took it as valid on its face."

² "REPORT WITH REGARD TO MOBILITY AND COMPLIANCE WITH THE CARAVAN SITES AND CONTROL OF DEVELOPMENT ACT 1960 AND THE CARAVAN SITES ACT 1968"; Croft Surveyors; Ref DAV/81/9034

³ Paragraph: 006 Reference ID: 17c-006-20140306

10. Having carefully considered all of the papers, it seems to me that the applicant could not have reasonably known that the Council (at the time of its decision) considered what is now agreed to be a caravan was not a caravan. Moreover, the LDC application was not concerned with achieving confirmation from the Council that the caravan was a caravan for reasons of lawfulness (or indeed was an application of a similar nature)...if that was its purpose, it seems likely that the application would have been accompanied by the evidence the applicant later sought to provide after the refusal of the application subject to the appeal before me. Rather, this was a s192 application of an entirely different nature sought to confirm that an interpretation of an earlier LDC was correct in its construction that a caravan on the site could be used for human habitation throughout the year. In my view, and with reference to the PPG, the applicant had submitted sufficient evidence to support that application.
11. Further (and also with reference to the PPG), despite the fact that the Council took over one year to determine the LDC application, it does not appear that the evidence it obtained (such as it was) that gave rise to its (found to be incorrect) judgement about the structure was *"shared with the applicant"* before the decision to allow an *"opportunity to comment on it and possibly produce counter-evidence"*. As far as I can see, the Council's evidence was limited (an officer site inspection not having been made) and the judgement that the structure may not be a caravan was largely based on aerial photography⁴. Had the Council shared this evidence and concerns with the applicant in advance of the decision, I find it likely that the applicant would have provided the counter-evidence necessary for the application to be successful (notwithstanding that the applicant had in my view already provided sufficient information with the application). Accordingly, an appeal – and the costs involved – would not have been necessary.
12. As to the subsequent reason for opposing the application, provided on appeal once the Council had accepted the caravan to be a caravan, I accept that the Appeal Decision⁵ was a recent one and issued only after the decision on the matter before me had been made. However, and notwithstanding in any event that an appeal decision is not case law and does not affect the lawfulness of any proposal being considered, for the reasons I have given in my Decision on the appeal it had no significance to the appeal before me as the 2005 LDC did not restrict the type of caravan. The Council should have known that this was not a reasonable basis on which to continue its opposition to the application, particularly as it clearly demonstrated in its submissions that it was not possible to "look behind" what was clear on the face of the 2005 LDC, and in doing so it unreasonably prolonged the appeal proceedings causing further unnecessary costs to the applicant.
13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

14. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that

⁴ At least one photograph being described by the Council as taken at high altitude and "slightly fuzzy"

⁵ APP/V2635/X/20/3263735; decision date 27 September 2021

Buckinghamshire Council shall pay to Ecology & Arts Club Limited, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

15. The applicant is now invited to submit to Buckinghamshire Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew Walker

INSPECTOR